

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





76-7541

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

DANIEL E. RYAN, Admr. of the Estate of Marvin George Ellsworth Mousseau,  
*Plaintiff,*  
vs.  
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,  
VERMONT CONSTRUCTION COMPANY, INC., and  
GEORGE & ASMUSSEN, LTD.,  
*Defendants,*

VERMONT CONSTRUCTION COMPANY, INC.,  
*Plaintiff-Appellant,*  
vs.  
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,  
*Defendant.*

Civil Action No. 73-240.

ALVIN E. MARTIN,  
*Plaintiff,*  
vs.  
NEW BEDFORD CORDAGE COMPANY, REYNOLDS & SON, INC.,  
VERMONT CONSTRUCTION COMPANY, INC., and  
GEORGE & ASMUSSEN, LTD.,  
*Defendants,*  
VERMONT CONSTRUCTION COMPANY, INC.,  
*Plaintiff-Appellant,*  
vs.  
JOHNSON INDUSTRIAL PAINTING CONTRACTORS, INC.,  
*Defendant.*

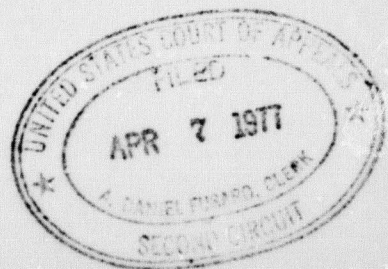
Civil Action No. 74-99.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
VERMONT IN CIVIL ACTIONS No. 73-240 AND 74-99.

**DEFENDANT VERMONT CONSTRUCTION'S  
REPLY BRIEF TO THE APPELLEE'S BRIEF**

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I

VERMONT LAW SHOULD CONTROL THE RIGHTS AND REMEDIES  
OF THE APPELLEES.

The appellees rely on Grenier vs. Alta Crest Farms, Inc., 115 Vt. 324 58 A 2d 884 (1948) to support their assertion that New York law should control this case. However, the issue in Grenier, whether a workman who is hired in a foreign state and injured in Vermont could collect compensation under the foreign state's law, is not present in this case. The issue is whether the compensation law of New York or Vermont should determine the immunities available to Vermont Construction in a suit for damages brought by the injured workman.

There is a conflict of law between New York and Vermont. Under the New York Workmen's Compensation Law, §56, McKinneys Consolidated Laws of New York Annotated, a contractor is liable for compensation to the employees of the subcontractor only if the subcontractor fails to carry Workmen's Compensation insurance. Under Vermont law, the principal employer is liable for compensation to the independent contractor's employees without regard to the independent contractor's insurance. 21 V.S.A. §601 (3). Under New York law the appellees would be entitled to sue Vermont Construction in tort; under Vermont law, the appellees cannot.



The appellees were entitled to collect Workmen's Compensation benefits in Vermont from Vermont Construction because they were employed in Vermont. They rendered services to Johnson and Vermont Construction at the Northeastern Hospital in Vermont. The Vermont compensation law covers all employment in Vermont. 21 V.S.A. §616. In DeGray vs. Miller, 106 Vt. 259 1934, the court held that the Workmen's Compensation Commissioner has jurisdiction over workman hired out of the state and injured in Vermont. Further the appellees became statutory employees of Vermont Construction, Inc. when they began actual work on the hospital in Vermont.

Because appellees could have collected Workmen's Compensation from Vermont Construction in Vermont, the policy of the Workmen's Compensation law of providing immunity from common law liability in exchange for statutory liability should require that the Vermont Construction be immune from common law liability in Vermont. Thus, the Vermont statute rather than the New York statute should be applied. In Wilson vs. Faull, 141 A 2d 768, an employee of a subcontractor was hired in New Jersey and injured in Pennsylvania. He collected compensation in New Jersey, from the subcontractor and sued the general contractor in New Jersey. Under Pennsylvania law, the general contractor is liable for compensation to his subcontractor's employees and immune from suit. In New Jersey, such liability was contingent on the subcontractor's failure to carry compensation insurance. The court applied Pennsylvania law and barred the suit for the following reasons:

"Choice of law in the situation presented here should not be governed by wholly fortuitous circumstances such as where the injury occurred, or where the contract of employment was executed, or where the parties resided or maintained their places of business, or any combination of these "contacts". Rather, it should be founded on broader considerations of basic compensation policy which the conflicting laws call into play, with a view toward achieving a certainty of result and effecting fairness between the parties within the framework of that policy. The injured workman has a prompt and practical compensation remedy in any state having a legitimate interest in his welfare. The person who provides that compensation in an interested state has a definitive liability which is predictable with some degree of accuracy and is granted an immunity from an employee's suit for damages which does not disappear whenever his enterprise chances to cross state lines and the suit is brought in another state." 148 A 2d at 778-779.

In the present case, the state of injury is the forum state rather than the foreign state but the court should apply the Vermont statute to carry out the overall policy of compensation law.

If the appellee is correct, and New York law controls the disposition of this case, then New York law should control the resolution of every issue in the case, not merely the Workmen's Compensation question. Therefore, under New York law, even if Vermont Construction was negligent in supervising the erection of the scaffold, it has a right to be indemnified by Johnson for breaching its contract with Vermont Construction. American Employers Insurance Company of Boston vs. Brandt Masonry, 252, App. Div. 506 299 M.I.S. 984-987 (1937); Birchall vs. Clemons Realty Company, 241 App. Div. 286, 271 N.Y.S. 547 (1934).



Furthermore under New York law, Vermont Construction has the right of contribution against Johnson. Dole vs. Dow Chemical Company, 30 N.Y. 2d 143 (1972). Therefore under New York law it was error to dismiss Vermont Construction's third-party claim against Johnson.

## II

THE APPELLEES ARE INCORRECT IN THEIR ARGUMENT THAT VERMONT CONSTRUCTION IS NOT AN EMPLOYER WITHIN THE MEANING OF 21 V.S.A §601 (3).

The appellees contend that O'Boyle vs. Parker Young Company, 95 Vt. 68, 112 A. 385 (1920) and Blue Ridge Rural Electric Cooperative vs. Byrd, 238 F 2d 346 (1956) do not support the appellant's argument that Vermont Construction was an employer within the meaning of 21 V.S.A. §601 (3) because the employers in those cases were not general contractors. These cases cannot be distinguished successfully merely because the employers are not general contractors. Vermont Construction, a general contractor, is a proprietor within the meaning of Section 601 (3) because the business of Johnson, painting the hospital, was a part of its business of building the hospital. These cases support this contention. Just as hauling lumber was a part of the business of the board manufacturer in Parker, the painting of the hospital was a part of Vermont Construction's business of constructing the hospital. 21 V.S.A. §601 (3) does not exclude general contractors from its scope.

The appellee contends that Adamson vs. Oakland Construction Company, 508 P. 2d 805 (1971) does not apply to this case because the statutes of Vermont and Utah are different. However, one of the requirements of the Utah statute for making an employer liable for compensation to a contractor's employee is that the work of the contractor is a part of the business of the employer. The court concluded that an electrical subcontractor's work was a part of the business of the general contractor. The reasoning is persuasive and should be followed in this case.

The appellee also cites Lawrence v. Yamauchi, 439 P. 2d 669, 671, (1968) which holds that, in a suit brought by the employee of a subcontractor, the general contractor was not "virtually the proprietor or operator of the business there carried on". The appellant believes that this case was not correctly decided. The work of the plastering subcontractor in Lawrence was a part of the business of constructing the hotel and the general contractor was statutory employer under the Hawaiian statute. The dissent notes that the majority relied on cases holding that lessees and owners of premises are within the statute, but the statute also includes another category, i.e. "other person who is virtually the proprietor or operator of the business there carried on". The general contractor was such a person.



The appellee argues that the liability of Vermont Construction to employees of the subcontractor for Workmen's Compensation is conditional upon the failure of the subcontractor to secure compensation as required by 21 V.S.A. §687 (Appellee's Brief, P.8). The argument is inconsistent with the argument that Vermont Construction was not an employer within 21 V.S.A. §601 (3). If Vermont Construction was not an employer within the Workmen's Compensation Act, then it could not be liable for Workmen's Compensation under any circumstances. Furthermore, the argument that the liability of Vermont Construction is conditional fails to take into account Morrisseau v. Legac, 123 Vt. 70 181 A. 2d 53 (1968) which holds that the liability of a general contractor under the Vermont Workmen's Compensation Act is primary, not secondary or conditional.

The appellees distinguish Burke v. Cities Service Oil Company of Delaware, 266 F. 2d 433 (1959); Burris v. J. Ray McDermott and Company, 116 F 907 (1953); Blue Ridge Electric Cooperative v. Byrd, 38 F. 2d 346 (1956) because they construe statutes which make the contractor unambiguously liable for compensation to employees of the subcontractor. (Appellee's Brief, P. 12). However, these cases were cited to support the proposition that Vermont Construction is immune from common law liability even though it has not paid compensation to the plaintiffs. (Appellant's Brief, P. 12-13). These cases support the proposition that immunity derives from liability for compensation and not from payment of compensation.

Although the acts construed in these cases define "employer" differently than Vermont's Act, the cases also support the general proposition that when a person is primarily liable for Workmen's Compensation he should be immune from common law liability.

### III

THE APPELLEES ARGUMENT THAT JOHNSON HAS NO DUTY TO INDEMNIFY VERMONT CONSTRUCTION IS INCORRECT BECAUSE JOHNSON BREACHED ITS CONTRACT WITH VERMONT CONSTRUCTION.

The verdict against Vermont Construction was based on its failure to discharge certain contractual duties, which included properly testing the scaffold from which the workman fell, and having a supervisor present at the job site at all times. Vermont Construction contracted with Johnson to perform these duties. Johnson breached these contractual obligations (see Appellant's Brief, P. 17-21). The appellees argument that Vermont Construction has no right of indemnification from Johnson ignores these breaches of their contract. The rule prohibiting indemnification between joint tort-feasors, which appellees rely on, has never been invoked to deny a party to a contract the right to recover damages for its breach. American Employers Insurance Company of Boston v. Brandt Masonry Corporation, 252 App. Div. 506 599 N.Y. Supp. 984 987 (1937), Reed v. United States, <sup>201</sup> F. 2d 758 3rd Cir. (1953).



Respectfully submitted,

MILLER & NORTON

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